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No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE UNITED STATES, PETITIONER

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS, AND PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND TO HONORABLE OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Supreme Court of the United States

OCTOBER TERM, 1931

NO. ——, ORIGINAL

EX PARTE: THE UNITED STATES, PETITIONER

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

Comes now the Solicitor General and moves the Court for leave to file the attached petition for a writ of mandamus, directed to the United States District Court for the Eastern District of Pennsylvania, and Honorable Oliver B. Dickinson, United States District Judge for the Eastern District of Pennsylvania, directing him to vacate a certain order made by him denying a motion for a bench warrant in the case of *United States* v. *Joseph V. Wingert,* and directing him to issue such bench warrant.

THOMAS D. THACHER,
Solicitor General.

MAY, 1932.

118371—32——1

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——, ORIGINAL

EX PARTE: THE UNITED STATES, PETITIONER

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AND TO HONORABLE OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

To the honorable the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Solicitor General, on behalf of the United States, respectfully represents as follows:

On the tenth day of March, 1932, a grand jury of the United States, lawfully summoned in the Eastern District of the State of Pennsylvania, presented an indictment against one Joseph V. Wingert, charging him in four counts with certain violations of the banking laws of the United States. This indictment was entered in the District Court as Cause No. 5195, December Term, 1931.

In the first count of this indictment it was charged that Wingert, who was secretary and treasurer of the North City Trust Co. of Pennsylvania, a banking institution incorporated and existing under the laws of the Commonwealth of Pennsylvania, and a member of the Federal Reserve Bank of Philadelphia, did unlawfully and feloniously embezzle from said member bank the sum of $900 with intent to injure and defraud the said member bank, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. The other counts of this indictment charged other embezzlements in similar language.

On the 22nd day of March, 1932, the United States Attorney for the Eastern District of Pennsylvania presented to the court a written petition praying that a bench warrant issue for the apprehension and arrest of Joseph V. Wingert. On consideration thereof, the District Court on March 22, 1932, denied the petition and declined to issue a bench warrant for the arrest of Wingert, referring for its reasons for this action to an opinion which it had previously filed in Cause No. 4867, March Session, 1931. In this previous opinion the court had refused to issue a bench warrant for the arrest of Wingert on a previous indictment which had been returned on May 27, 1931, by the grand jury in the Eastern District of Pennsylvania.

Copies of the indictment in Cause No. 5195, December Term, 1931, the petition of the United States Attorney for a bench warrant, and the order of the United States District Court denying the motion for a bench warrant, duly certified by the Clerk of the United States District Court under the seal of that court, have been filed with the Clerk of this Court, and are set forth as Exhibit A to this petition (*infra,* pp. 7–15). A copy of the opinion of the United States District Court, filed originally in Cause No. 4867, March Session, 1931, and adopted by the court in Cause No. 5195, December Term, 1931, by its order of March 22, 1932, duly certified by the Clerk of the United States District Court under seal of that court, has been filed with the Clerk of this Court, and is set forth as Exhibit B of this petition (*infra,* pp. 16–25). All the matters herein alleged are of record.

Your petitioner claims that the action of the United States District Court for the Eastern District of Pennsylvania in denying the motion of the United States Attorney for the issuance of a bench warrant for the arrest of Joseph V. Wingert, and in refusing to issue a bench warrant upon an indictment duly returned and fair upon its face, charging a violation of the criminal laws of the United States, is entirely without warrant of law, and is not a matter within the judicial discretion of the United States District Court.

Wherefore, your petitioner prays that an alternative writ of mandamus issue out of this Court to the

Honorable Oliver B. Dickinson, United States District Judge for the Eastern District of Pennsylvania, and to the court itself, directing that the order entered on the twenty-second day of March, A. D. 1932, denying the motion for a bench warrant for the arrest of Wingert be vacated and set aside, and that a bench warrant for the arrest of Wingert be duly issued, or that the said Honorable Oliver B. Dickinson, judge of said court, show cause on a day to be fixed by this Honorable Court why this should not be done.

THOMAS D. THACHER,
Solicitor General.

MAY, 1932.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 5195, December Term, 1931

UNITED STATES OF AMERICA

v.

JOSEPH V. WINGERT

ORDER

And now, to wit, this 22nd day of March, A. D. 1932, the within motion for bench warrant for the arrest of defendant in the above entitled case is denied on the opinion filed in cause No. 4867, March Sessions, 1931.

By the court:

(S.) DICKINSON, *J.*

File No. 14724–2.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 5195, December Sessions, 1931

UNITED STATES OF AMERICA

v.

JOSEPH V. WINGERT

PETITION FOR BENCH WARRANT

To the honorable, the JUDGES OF THE ABOVE ENTITLED COURT:

The Petition of Edward W. Wells respectfully represents:

1. That he is United States Attorney for the Eastern District of Pennsylvania.

2. That the Grand Inquest of the United States for the Eastern District of Pennsylvania was duly and lawfully convened and held one of its sessions on March 9, 1932, and at said session, upon hearing of evidence properly presented, said Grand Inquest duly found, returned and filed a true bill of indictment against Joseph V. Wingert, defendant above named, as of the above entitled term and number. A true and correct copy of the indictment so found by said Grand Inquest is hereto attached, made part hereof, and marked "Exhibit 1."

3. That said Grand Inquest found, returned and filed said true bill of indictment, notwithstanding that leave had not been previously had and obtained from this Honorable Court to present the matter to said Grand Inquest for its consideration and notwithstanding the fact that there had been had no preliminary hearing before any official duly authorized by law to hold preliminary hearings.

4. That said Joseph V. Wingert is a citizen of the State of Pennsylvania and a resident of the Eastern District thereof and for several years last past, has openly and publicly resided within the jurisdiction of this Honorable Court, and has been and now is, subject to due process issued therefrom.

Wherefore, your Petitioner prays this Honorable Court, the said indictment having been so found as aforesaid, that a bench warrant be issued for the apprehension and arrest of said Joseph V. Wingert. And your Petitioner will ever pray, etc.

(S.) EDWARD W. WELLS,
United States Attorney.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Edward W. Wells, being duly sworn, according to law, deposes and says that he is United States Attorney in and for the Eastern District of Pennsylvania; that he has read the foregoing Petition for Bench Warrant, and that the facts therein contained are true and correct to the best of his knowledge, information and belief.

(S.) EDWARD W. WELLS,
United States Attorney.

Sworn to and subscribed before me this 16th day of March, A. D. 1932.

[SEAL] (S.) EDGAR O. GARRETT,
Deputy Clerk District Court United States, Eastern District of Pennsylvania.

File No. 14724.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 5195, December Sessions, 1931

UNITED STATES OF AMERICA

v.

JOSEPH V. WINGERT

INDICTMENT

COUNT I

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affir-

mations, do present that heretofore, to wit: on or about September 5, 1930, Joseph V. Wingert, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, was an employee and officer, to wit: Secretary and Treasurer, of the North City Trust Company, a banking institution theretofore incorporated and existing under the laws of the Commonwealth of Pennsylvania and at all times mentioned herein doing business as a banking institution in the City of Philadelphia, which banking institution was then and there a Federal Reserve Member Bank of the Philadelphia District; that said Joseph V. Wingert then and there took into and had in his possession and under his control, as such officer and employee of said Member Bank, a large sum of money, of the moneys of said Member Bank then and there being, to wit: the sum of $900.00, the particular kinds and descriptions of the moneys going to make up said sum the Grand Inquest aforesaid have no means of knowing and therefore do not set forth in this indictment; and that he, the said Joseph V. Wingert, with intent then and there on his part to injure and defraud said Member Bank, the said sum of money, so then and there in his possession as such officer of said Member Bank, then and there without right did convert to his own use and benefit and not to any use or benefit of said Member Bank, and the same money then and there, under the circumstances aforesaid, thereby unlawfully and feloniously did embezzle;

Against the peace and dignity of the United States, and contrary to the form of the Statute of the same in such case made and provided.

COUNT II

And the Grand Inquest inquiring as aforesaid, upon their oaths and affirmations, do herein further present that heretofore, to wit: on or about September 5, 1930, said defendant, Joseph V. Wingert, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, was an employee and officer, to wit: Secretary and Treasurer, of the North City Trust Company, a banking institution theretofore incorporated and existing under the laws of the Commonwealth of Pennsylvania and at all times mentioned herein doing business as a banking institution in the City of Philadelphia, which banking institution was then and there a Federal Reserve Member Bank of the Philadelphia District; that said Joseph V. Wingert then and there took into and had in his possession and under his control, as such officer and employee of said Member Bank, a large sum of money, of the moneys of said Member Bank then and there being, to wit: the sum of $825.00, the particular kinds and descriptions of the moneys going to make up said sum the Grand Inquest aforesaid have no means of knowing and therefore do not set forth in this indictment; and that he, the said Joseph V. Wingert, with intent then and there on his part to injure and defraud said Member Bank, the said sum of money, so then and there in his possession as such officer of said Member Bank, then and there without right did convert to his own use and benefit and not to any use or benefit of said Member Bank, and the same money then and there, under the circumstances aforesaid, thereby unlawfully and feloniously did embezzle;

Against the peace and dignity of the United States, and contrary to the form of the Statute of the same in such case made and provided.

COUNT III

And the Grand Inquest inquiring as aforesaid, upon their oaths and affirmations, do herein further present that heretofore, to wit: on or about September 5, 1930, said defendant, Joseph V. Wingert, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, was an employee and officer, to wit: Secretary and Treasurer, of the North City Trust Company, a banking institution theretofore incorporated and existing under the laws of the Commonwealth of Pennsylvania and at all times mentioned herein doing business as a banking institution in the City of Philadelphia, which banking institution was then and there a Federal Reserve Member Bank of the Philadelphia District; that said Joseph V. Wingert then and there took into and had in his possession and under his control, as such officer and employee of said Member Bank, a large sum of money, of the moneys of said Member Bank then and there being, to wit: the sum of $875.00, the particular kinds and descriptions of the moneys going to make up said sum the Grand Inquest aforesaid have no means of knowing and therefore do not set forth in this indictment; and that he, the said Joseph V. Wingert, with intent then and there on his part to injure and defraud said Member Bank, the said sum of money so then and there in his possession as such officer of said Member Bank, then and there without right did convert to his own use and benefit and not to any use or benefit

of said Member Bank, and the same money then and there, under the circumstances aforesaid, thereby unlawfully and feloniously did embezzle;

Against the peace and dignity of the United States, and contrary to the form of the Statute of the same in such case made and provided.

COUNT IV

And the Grand Inquest inquiring as aforesaid, upon their oaths and affirmations, do herein further present that heretofore, to wit: on or about September 5, 1930, said defendant, Joseph V. Wingert, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, was an employee and officer, to wit: Secretary and Treasurer, of the North City Trust Company, a banking institution theretofore incorporated and existing under the laws of the Commonwealth of Pennsylvania and at all times mentioned herein doing business as a banking institution in the City of Philadelphia, which banking institution was then and there a Federal Reserve Member Bank of the Philadelphia District; that said Joseph V. Wingert then and there took into and had in his possession and under his control, as such officer and employee of said Member Bank, a large sum of money, of the moneys of said Member Bank then and there being, to wit: the sum of $925.00, the particular kinds and descriptions of the moneys going to make up said sum the Grand Inquest aforesaid have no means of knowing and therefore do not set forth in this indictment; and that he, the said Joseph V. Wingert, with intent then and there on his part to injure and defraud said Member Bank, the said sum of money so then and there in his possession as such officer of

said Member Bank, then and there without right did convert to his own use and benefit and not to any use or benefit of said Member Bank, and the same money then and there, under the circumstances aforesaid, thereby unlawfully and feloniously did embezzle;

Against the peace and dignity of the United States, and contrary to the form of the Statute of the same in such case made and provided.

(S.) EDWARD W. WELLS,
United States Attorney.

PHILADELPHIA, PA., *23d February, 1932.*

[Indorsed on cover:]

No. 5195 Sessions, 192

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

THE UNITED STATES OF AMERICA
v.
JOSEPH V. WINGERT

True bill.

HARRISON I. POTTS,
Foreman.

INDICTMENT

Illegally and feloniously embezzling funds of Federal Reserve Member Bank.

Converting to own use funds of Federal Reserve Member Bank.

Witnesses:

LESLIE F. HUNTT.

R. S. 5209, as amended by Act 9–18–26. 40 Stat. P. L., p. 972.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, George Brodbeck, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Order and Decree, and Petition for Bench warrant, filed on the 22nd day of March, 1932, and Indictment, filed on the 10th day of March, 1932, in the case of *The United States of America* v. *Joseph V. Wingert,* No. 5195, December Term, 1931, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 24th day of March, A. D. 1932.

[SEAL.] GEORGE BRODBECK,
Clerk.

By E. G. JOHNSON,
Deputy Clerk.

EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 4867, March Sessions, 1931

UNITED STATES OF AMERICA

v.

JOSEPH V. WINGERT

SUR MOTION FOR BENCH WARRANT

Before the Court en Banc, Judges Dickinson and Kirkpatrick sitting

DICKINSON, *J.*: The motive and purpose of this proceeding calls for a rather lengthy preamble.

Those accused of crime have two dearly bought rights now confirmed to them by the practice of a quarter of a millenium. One is the right to a fair trial, and the other, to the equal and even more valuable right of protection from arrest except on probable cause and from the ignominy, loss of time, and expense following unfounded accusations. The latter is afforded by the provision of the Fourth Amendment and the practice that no one shall be put on trial until some responsible official or tribunal has found that he should be so tried. Ordinarily this protection is afforded (or at least heretofore has been) by the requirement (1) of a complaint under oath before any arrest; (2) a

binding over by a committing magistrate; (3) the right to invoke the judgment of a Court into the causes of a commitment; and (4) the finding of a Grand Jury.

There is a fifth protection which, when given, is of more practical value than any of the others. This is afforded by the refusal of a fair-minded prosecuting attorney to press an unfounded charge. This official has an opportunity to know the facts and can bring to his decision a judgment trained by experience. Whether for good or ill we have lost the benefit of this. The drift to what is known as the policy of "centralization of power" has shifted the decision of what prosecutions shall be brought or pressed from the United States Attorney who knows all the facts to an official 150 or 3,000 miles away who does not and can not know them. The latter is perforce compelled to decide the question upon some broad general policy which however sound may be inapplicable under the particular facts of a particular case. The United States Attorney, who is on the ground, is in consequence powerless to pass upon the propriety of the prosecution, and the accused not only loses a right of great value to him but what concerns directly the Courts our lists are cluttered up with cases which the developments of the trial show should never have been brought. The ordeal of trial to which an innocent defendant is thus subjected is no light matter, and emphatically so in a court of the United States. In a County Court he is afforded another real protection in the fact that he is tried by a jury to whom he is not altogether unknown. In a United States Court he is taken to a distant

place for trial, and is among strangers to whom he is known only as one accused and hence probably guilty of a more or less heinous offense. His name is bruited about in the newspapers as a felon and prospective convict, and his offense described in the lurid verbiage of an indictment.

It is true that the language of indictments has been somewhat softened, and he is not said, as formerly, to have been "instigated by the Devil" but even yet indictments are by no means complimentary in phraseology. The charge against him usually starts from some private source, often in hiding, as the writer of an anonymous letter. This goes to a highly trained band of official investigators whose efficiency is measured by the number of prosecutions brought. These men are chosen for their capacity to become real sleuth hounds of the law and they are trained to the minute. What is expected of them, and this is backed by the professional instinct, is that a case be built up and presented against the accused. They are all men of a high type, considerate and fair, but they are human and failure means professional and official defeat. The preparation for the trial is often at a cost which reaches the proportions of what to many people would be a fortune. The accused is forced to go to a corresponding expense in the preparation of his defense. Unless he does so, no matter how innocent, he is doomed. The mere expense to which he is thus subjected is in itself no light matter. There is another feature of practical moment. If a hearing be given the defendant he has some knowledge which is a great aid in the preparation of his defense. If an indictment is secretly found and a bench warrant follows a defendant may be hauled

into Court by "railroad." We are glad to bear witness that this is not done but the power is fraught with the possibilities of frightful abuse. Of course it may be objected to all this and will be that under our system of administering legal justice there is more danger of the escape of the guilty than the conviction of the innocent. This, however, is aside from the mark, for we are not discussing trials but protection from unfounded charges, and as a matter of pure policy the elimination of trivial and unfounded accusations will not obstruct but will aid in the conviction of the really guilty.

Since the ruling in the *United States* v. *Thompson* (251 U. S. 407) *case,* the practice has grown up of having those who are to be tried indicted in the first instance by a Grand Jury. All the protection before given accused persons is thus cut out except that given by the Grand Jury. This changes our system from what we had to the "J'Accuse" system. We can readily understand that this is a great convenience to the United States Attorney and the Inspector officers. It is, however, at the cost of ignoring the United States Commissioners and of denying to the accused the right, through a denial of the opportunity, to get the judgment of the Court upon the question of probable cause. It may be said of course that the accused still has the protection of a finding by the Grand Jury as before, but this becomes no more than a star chamber proceeding with a carefully prepared prima facie case submitted with all suggestions of what may be behind it shut out. When the United States Attorney has submitted and the Grand Jury has found a True Bill the defendant can not be tried because not in Court. So far as anyone has been able to

suggest there is no other way of getting him before the Court than by the issuance of a Bench Warrant. The question then arises of whether one should issue as a matter of course or whether the Court may lawfully exercise its judgment before issuing it. In practice such Bench Warrants are issued whenever there is, as there usually is, justification for the issue.

This proceeding has been brought by the United States Attorney at the suggestion of the Court to have the naked question of power discussed and determined. The question of the propriety of the exercise of the power does not arise. Is the Court bound to issue a Bench Warrant or may it first inquire into the occasion for its issuance?

To get down to the question of power we may thus assume that when all the facts are disclosed it will appear that the accused should not be put upon trial; that no Commissioner or Committing Magistrate would hold him for trial; and that the Court after hearing the evidence is of opinion that there is no case made out against him. These are all assumptions, but the question before us is whether if such be the case the Court is nevertheless bound to issue a Bench Warrant. The Grand Jury, however, has found a True Bill and hence "probable cause" has been found. Is this conclusive? If the Court has no power to refuse a Bench Warrant (which is the precise and only question before us), of course it must issue, but there is something repellent in the thought that a Court is bound without inquiry to deprive anyone of his liberty when upon such inquiry the judgment of the Court would be that such deprivation would be unwarranted. Of course, again there are cases in which the ordi-

nary course of the practice of administering legal justice warrants holding an accused for trial without any preliminary inquiry, as in the cases of presentments by a Grand Jury and cases in which the Court itself directs a party to be so held. These are, however, of that type of exceptions which are said to prove the rule because in these cases it is self evident that the accused should stand trial.

The instant case has been chosen merely because it was a case in which no preliminary inquiry has been made, but in which there was no special reason one should not be made. As before stated, the question raised is the naked question of whether the Court has any discretionary control over the issuance of a Bench Warrant or must issue it.

The very capable representative of the United States Attorney's Office wishes to have this question squarely met and decided and thus stands for the proposition that the Court has no discretionary power. In his view of the effect of a concession of the power would be to nullify the action of the Grand Jury. Just here care must be taken not to confuse the question of the existence of the power with the other question of the propriety of its exercise. There is, we think, no doubt that a True Bill is evidence of probable cause, but in the somewhat analogous case of a removal warrant the indictment, although evidence, is concededly only prima facie evidence. In such cases the Court before issuing its process goes into an inquiry. The Court, it is true, does not usurp the functions of the Trial Court by going into the question of guilt but it does determine the other question of whether the defendant should be sent to the other jurisdiction for trial. Likewise in Bench Warrant cases there

would be no thought of finding guilt or innocence but to determine the other question of whether the accused should be put on trial.

The United States Attorney puts the question before us on what seems to us the wrong basis when he views it as the question of whether the accused has the right to a preliminary hearing before an indictment may be submitted to a Grand Jury. This question has been settled for us by the ruling in the *Thompson case* (*supra*). There is no such absolute right, as the United States Attorney may submit a Bill without a hearing and without the previous leave of the Court. Nor is the unreported case of Fitzgerald and Smith (ruled by this Court) in point. There is no doubt of the power because it is the common practice, of the Court on Habeas Corpus, to review a commitment by a Commissioner and to discharge the relator if probable cause does not appear, but this has never been known to be done after indictment. The reason for the difference is obvious. The question of power so easily slides into the other question of the propriety of its exercise, that it is difficult to keep them separated in thought. If a Bench Warrant should issue of course it will be issued but the question (already several times stated) is whether the Court is bound to issue it, although the judicial judgment is that it should not issue. The power on proper occasion not to issue it carries the power to inquire whether it should issue. The possession of this latter power must at least in some degree be possessed as in a case in which the question of identity is raised. The Government stands squarely for the proposition that the act of the Court is purely ministerial and in no sense judicial. The proposition that a

Grand Jury may on its own motion present any one is undoubtedly sound and no Court would refuse its process to bring the accused into Court. The practical difficulties of giving control over Bench Warrants suggested are more fanciful than real. The discretion, if it exists, is necessarily a judicial discretion and is bound to be properly exercised. All that is conceded. The question raised, we repeat, is whether a Court is bound to issue its warrant for the arrest of a man when in the proper exercise of its judicial judgment it finds that he should not be arrested. The Fourth Amendment and our proud boast that we are the subjects of laws and not of men has behind it the actual experiences of the people whose system of criminal jurisprudence we have in large part appropriated. It means that no man, and a Judge no more than any other man, governs us nor can he deprive us of our liberty. We are governed by the law and "no warrant" (there is no qualification) can lawfully issue for our arrest except as the law prescribes. "J'Accuse" no more than "lettres de cachet" process can touch us.

It is not meant by this that the Fourth Amendment forbids the issuance of Bench Warrants. Its words, it is true, are that "no warrant" shall issue without a finding of probable cause and a supporting oath for which the affiant may be held responsible, and a Bench Warrant is a warrant. Constitutions, however, no more than Statutes mean what they say. They mean what they mean and they mean what the Courts find them to mean. Time out of mind Bench Warrants have issued without a preliminary oath. This means that the Fourth Amendment does not forbid the practice. A Court

may and on innumerable occasions the Courts have so issued Bench Warrants. No precedent, however, has been brought to our notice, and the industry of counsel has discovered none, for a Court to issue a Bench Warrant after the Court has found that a Bench Warrant should not issue. The proposition advanced by the U. S. Attorney that the Court is bound to issue a warrant which the Court thinks should not issue is at least somewhat startling.

We have had the benefit of a very helpful discussion of the question involved both by the United States Attorney who argued in support of the petition and Mr. Biddle who as amicus curiæ has presented the opposing view. Want of space prevents us from following these arguments. They have taken in the question of writs of mandamus. We hope a way will be found to meet the real question raised without raising any procedural questions. So far as an expression of our wishes can promote this, our wish and hope is that the conclusion we have reached may be reviewed and a ruling made which will settle the question for us. The United States Attorney has asked us for a Bench Warrant which we have refused. This is in effect a final judgment as much as the quashing of an indictment, and we hope is the proper subject of review.

If, however, there is no way of raising the question by Appellate review other than by mandamus we express our entire willingness to have it so raised.

All the members of the Court have joined in the refusal of the Bench Warrant in order that the question may be settled. There could be no appel-

late review except of a refusal to issue and hence all join in the order made.

The petition for a Bench Warrant is denied as presented, with leave to the United States Attorney to submit proof of facts so that the Bench Warrant, if issued, will have the support required by the Fourth Amendment.

Petition denied.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, ss:

I, George Brodbeck, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of the original Opinion, filed on the 6th day of February, 1932, in the case of *United States of America* v. *Joseph V. Wingert,* No. 4867, March Term, 1931, now remaining among the records of the said Court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 24th day of March, A. D. 1932.

GEORGE BRODBECK,
Clerk.

By E. G. JOHNSON,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

MAY 23

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE UNITED STATES, PETITIONER

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

NO. —, ORIGINAL

EX PARTE: THE UNITED STATES, PETITIONER

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court is set out as Exhibit B (pp. 16–25) to the petition for a writ of mandamus. It is reported in 55 F. (2d) 960.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 234 and 262 of the Judicial Code (U. S. C., Title 28, Secs. 342, 377).

QUESTION PRESENTED

Whether a District Judge may in his discretion refuse to issue a bench warrant for the arrest of a defendant named in an indictment, duly returned by a grand jury, which charges the defendant with

having committed an offense within the jurisdiction of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1014 of the Revised Statutes (U. S. C., Title 18, Sec. 591) provides as follows:

> For any crime or offense against the United States, the offender may, by any jus-

tice or judge of the United States, or by any commissioner of a circuit court to take bail,[1] or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

SUMMARY OF ARGUMENT

I. The fact that there was no preliminary examination prior to the return of the indictment is not a proper ground for the refusal of a bench

[1] The duties of commissioners of circuit courts, referred to in this section, were transferred to United States Commissioners by the Act of May 28, 1896, c. 252, Sec. 19, 29 Stat. 184.

warrant. Such examination is not required or made necessary either by the Fourth or Fifth Amendment. The return of the indictment is at least *prima facie* evidence of probable cause required by the Fourth Amendment.

II. Upon the return of an indictment, fair upon its face, the district court has no discretion to refuse to issue a bench warrant. The issuance of a bench warrant for the arrest of one against whom an indictment has been found is a ministerial and not a judicial act. In numerous cases this Court has issued writs of mandamus to lower Federal courts to compel the performance of ministerial acts.

III. Mandamus is the proper remedy. The United States can not appeal in a criminal case in the absence of specific statutory authority. There is no statute giving the United States authority to appeal either to this Court or to the Circuit Court of Appeals upon the refusal of a district judge to issue a bench warrant. Therefore mandamus is the only remedy.

ARGUMENT

It is difficult to tell from the opinion of the District Court just what the grounds are upon which its decision is based. We contend that, under the circumstances of this case, the issuance of a bench warrant was mandatory, and that mandamus is the proper remedy to correct the error committed by the District Court.

I

THE FACT THAT THERE WAS NO PRELIMINARY EXAMINATION PRIOR TO THE RETURN OF THE INDICTMENT IS NOT A PROPER GROUND FOR THE REFUSAL OF A BENCH WARRANT

The District Court concedes in its opinion (Exhibit B, p. 22 of the petition) that the accused had no right to a preliminary examination, citing *United States* v. *Thompson*, 251 U. S. 407. Nevertheless the court states (pet. p. 21) that—

> The instant case has been chosen merely because it was a case in which no preliminary inquiry has been made, but in which there was no special reason one should not be made.

A preliminary examination prior to the return of an indictment is not required or necessary.[2] The Constitution does not require any preliminary hearing. Fifth Amendment (*supra*, p. 2); see *Hughes* v. *Gault*, 271 U. S. 142, 149. The finding of an indictment without a sworn charge previously made is legal, and "it is settled that such a charge is unnecessary." *Ruthenberg* v. *United States*, 245

[2] The authorities so holding are unanimous and include at least two cases in the Eastern District of Pennsylvania. *United States* v. *Reilly*, 30 F. (2d) 866 (E. D. Pa.); *United States* v. *Averett*, 26 F. (2d) 676 (W. D. Va.); *Van Dam* v. *United States*, 23 F. (2d) 235 (C. C. A. 6th); *Roth* v. *United States*, 294 Fed. 475 (C. C. A. 6th); *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.); *United States* v. *Fuers*, Fed. Cas. No. 15174 (W. D. Pa.). See *Goldsby* v. *United States*, 160 U. S. 70, 73; *United States* v. *Kilpatrick*, 16 Fed. 765, 770–771 (W. D. N. C.). Compare *United States* v. *Jenks*, 258 Fed. 763 (E. D. Pa.).

U. S. 480, 482–483; *Hale* v. *Henkel,* 201 U. S. 43, 59–60. The practice of requiring a preliminary examination of a criminal complaint was the English practice, and it has been adopted in some of the States of the Union, for example, Pennsylvania and North Carolina. See *Hale* v. *Henkel, supra,* at pp. 64–65. But the English practice is not followed by nor binding upon the United States courts. *United States* v. *Thompson,* 251 U. S. 407; *Hale* v. *Henkel, supra; United States* v. *Kerr,* 159 Fed. 185 (E. D. Pa.).

The Fourth Amendment (*supra,* p. 2) provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." But the return of an indictment is at least *prima facie* evidence of probable cause. *Hyde* v. *Shine,* 199 U. S. 62, 84; *Price* v. *Henkel,* 216 U. S. 488, 492–493; *Fetters* v. *United States,* 283 U. S. 638. The requirement that the warrant shall be supported by oath or affirmation is fully met by the fact that both the grand jurors and the witnesses are sworn before the witnesses are heard.

II

UPON THE RETURN OF AN INDICTMENT, FAIR UPON ITS FACE, THE DISTRICT COURT HAS NO DISCRETION TO REFUSE TO ISSUE A BENCH WARRANT

It is the duty of the officers of the Government to prosecute crime, and performance of this duty in the absence of abuse is not subject to judicial control. The "absolute right of the United States

to prosecute" can not be thwarted "by the application of unauthorized judicial discretion." *United States* v. *Thompson,* 251 U. S. 407, 412–413. In *Ex parte United States,* 242 U. S. 27, 42, this Court held that the judicial power did not embrace "a discretionary authority to permanently refuse to try a criminal charge." These words describe the present situation exactly. Unless the accused comes into court voluntarily (which is not at all probable), the court's refusal to issue a bench warrant amounts to a permanent refusal to try the criminal charge. In the language of this Court in *United States* v. *Thompson,* 251 U. S. 407, 415—

> the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

The act of issuing a bench warrant to apprehend a defendant named in an indictment is purely ministerial.[3] The warrant is the process by which

[3] No authorities have been found in the federal courts directly sustaining this proposition, presumably because the occasion to consider the question has never arisen. Two state courts have held the issuance of a bench warrant is a ministerial act, and that the court has no discretion to refuse it. *In re Davis,* 107 N. J. Eq. 160, 175, 178; *State* v. *Gordon,* 18 La. Ann. 528.

the defendant is brought before the court for arraignment upon the indictment, upon which no proceedings may be had until the defendant is arraigned. The act of issuing process determines nothing, and is no more judicial than the issuance of a summons in a civil suit or a subpœna for the attendance of a witness. Given an indictment fair upon its face, and duly returned by the grand jury, the issuance of the warrant is but a ministerial step in the process by which the validity of the indictment and the guilt or innocence of the defendant may be judicially determined. The refusal of process was in effect a refusal to proceed at all. From the decisions of this Court it may be deduced that, such an act is not discretionary but ministerial and mandatory. Thus in *Insurance Company* v. *Wilson,* 8 Pet. 291, 304, where a judge refused to sign a judgment rendered by his predecessor who had died, this Court said:

> The act of signing the judgment is a ministerial and not a judicial act.

In numerous cases this Court has issued writs of mandamus to lower federal courts to compel the performance of ministerial acts. *United States* v. *Peters,* 5 Cranch, 115; *Ex parte Milwaukee Railroad Co.,* 5 Wall. 825; *Hudson* v. *Parker,* 156 U. S. 277; *Ex parte United States,* 242 U. S. 27; *Ex parte Simons,* 247 U. S. 231. See also *Ex parte Many,* 14 How. 24; *Insurance Company* v. *Comstock,* 16 Wall. 258; *Ex parte Buder,* 271 U. S. 461.

III

MANDAMUS IS THE PROPER REMEDY

The United States can not appeal in a criminal case, in the absence of specific statutory authority. In *United States* v. *Sanges,* 144 U. S. 310, this Court held that the United States could not take out a writ of error from a decision of a District Court sustaining a demurrer to an indictment. Specific authority to appeal in such cases was granted to the United States by the Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C., Title 18, Sec. 682). In *United States* v. *Dickinson,* 213 U. S. 92, this Court dismissed for want of jurisdiction a writ of certiorari which had been granted in a criminal case on the petition of the United States. Thereafter authority to file petitions for certiorari was specifically granted to the United States by Section 240 of the Judicial Code. But there is no statute giving the United States authority to appeal from the refusal of a District judge to issue a bench warrant.[4] Therefore even if the refusal to issue a bench warrant were a "final decision" within the meaning of Sec-

[4] In *United States* v. *Murray,* 275 U. S. 347, and *United States* v. *Benz,* 282 U. S. 304, the United States did appeal to the Circuit Court of Appeals from orders in criminal cases which do not seem to have been within the scope of any statute authorizing the United States to appeal. No question was raised in either case as to the jurisdiction of the Circuit Court of Appeals.

tion 128 of the Judicial Code, the United States could not appeal to the Circuit Court of Appeals. Consequently mandamus is the only remedy. In the language of this Court in *Insurance Company* v. *Wilson,* 8 Pet. 291, 303:

> it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it.

CONCLUSION

The writ of mandamus should issue as prayed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
NUGENT DODDS,
Assistant Attorney General.
WILLIAM H. RAMSEY,
ERWIN N. GRISWOLD,
Attorneys.

MAY, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

ANSWER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND OF THE HON. OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, TO THE PETITION OF THE UNITED STATES, BY ITS SOLICITOR GENERAL, FOR A WRIT OF MANDAMUS.

And now come the United States District Court for the Eastern District of Pennsylvania, and the Honorable Oliver B. Dickinson, respondents to the petition for a writ of mandamus filed by the United States by its Solicitor General, and make return to the said petition and to the rule to show cause granted thereon as follows:

1. Respondents admit that on the 10th day of March, 1932, a Grand Jury of the United States, law-

fully summoned in the Eastern District of the State of Pennsylvania, presented an indictment against one, Joseph V. Wingert, charging him in four counts with certain violations of the banking laws of the United States, a copy of which indictment is attached to the petition for mandamus.

2. Respondents admit that the counts in said indictment charged the said defendant with unlawfully and feloniously embezzling certain sums of money from North City Trust Co. of Pennsylvania, a member of the Federal Reserve Bank of Philadelphia, with intent to injure and defraud the said bank.

3. Respondents admit that on March 22, 1932, the United States Attorney for the Eastern District of Pennsylvania, presented to the Court a written petition praying that a bench warrant for the apprehension and arrest of Joseph V. Wingert; and that after consideration thereof the District Court, on March 22, 1932, denied the petition, and declined to issue a bench warrant for the arrest of Wingert.

4. Respondents admit that a copy of the indictment and petition for the bench warrant, and order thereon, are attached to the petition for a mandamus as Exhibit A; and that a copy of the opinion of the United States District Court is attached thereto as Exhibit B.

5. Respondents deny the action of the United States District Court for the Eastern District of Pennsylvania, in denying the motion for the issuance of the bench warrant, was without warrant of law as charged in the petition for mandamus; and aver, on the con-

trary, that said action was a matter within the judicial discretion of the United States District Court, and therefore not subject to mandamus proceedings.

WHEREFORE respondents pray that the petition and rule to show cause why writ of mandamus should not issue be discharged; and that respondents be dismissed with costs.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA,
By O. B. DICKINSON,
Judge.

O. B. DICKINSON,
United States District Judge for
the Eastern District of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Oliver B. Dickinson being duly sworn according to law deposes and says that he is Judge of the United States District Court for the Eastern District of Pennsylvania, and that the facts set forth in the within answer are true and correct to the best of his knowledge, information and belief.

O. B. DICKINSON.

Sworn and subscribed to before me this 31st day of August, 1932.

[SEAL.] GEORGE BRODBECK,
Clerk U. S. District Court,
Eastern District of Pennsylvania.

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CHARLES ELMORE C

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1932

EX PARTE: THE UNITED STATES, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AT THE ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 19, ORIGINAL

EX PARTE: THE UNITED STATES, PETITIONER

BRIEF FOR THE UNITED STATES AT THE ARGUMENT

OPINION BELOW

The opinion of the District Court, upon which the issuance of a bench warrant was denied, is set out as Exhibit B (pp. 16–25) to the petition for a writ of mandamus. It is reported in 55 F. (2d) 960.

JURISDICTION

The motion for leave to file the petition for writ of mandamus was submitted on May 16, 1932. The petition for writ of mandamus was filed May 23, 1932, and a rule to show cause was issued returnable October 3, 1932. The return to the rule to show cause was submitted October 3, 1932. The jurisdiction of this Court is invoked under Sections 234 and 262 of the Judicial Code (U. S. C., Title 28, Secs. 342, 377). *Ex parte United States,* 242 U. S. 27, 39–40.

QUESTION PRESENTED

Whether a District Judge may in his discretion refuse to issue a bench warrant for the arrest of a defendant named in an indictment, duly returned by a grand jury, which charges the defendant with having committed an offense within the jurisdiction of the court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to be taken for public use, without just compensation.

STATEMENT

The petition for a writ of mandamus was filed, by leave of Court, on May 23, 1932. The facts stated in the petition may be summarized as follows:

On March 10, 1932, the grand jury in the Eastern District of Pennsylvania presented an indictment against one Joseph V. Wingert, charging him in four counts with certain violations of the banking laws of the United States. On March 22, 1932, the United States Attorney for the Eastern District of Pennsylvania presented to the court a written petition praying that a bench warrant issue for the arrest of Wingert. On consideration of this motion, the respondent, on March 22, 1932, denied the petition and declined to issue the bench warrant for the arrest of Wingert.

Copies of the indictment, of the petition of the United States Attorney for the bench warrant, and the order of the respondent denying the motion for a bench warrant are set forth as Exhibit A to the petition (pp. 7–15).

On October 3, 1932, the respondent's return to the rule to show cause was submitted. In this return all the allegations of fact in the petition for mandamus are admitted, but it is asserted that the action of the respondent was within his judicial discretion and not subject to control by mandamus.

SUMMARY OF ARGUMENT

I. When an indictment has been returned, fair on its face and charging an offense within the jurisdiction of the court, the issuance of a bench warrant does not depend upon the exercise of judicial discretion. In considering the power and duty of a court to issue a warrant it is important to distinguish between three distinct situations: (1) A warrant of arrest may be sought from a magistrate prior to indictment upon the complaint of any person, either officer or citizen. Most of the cases cited in the brief of counsel for the respondent relate to this situation and are obviously not pertinent here. (2) A warrant may be sought for the purpose of removing a person charged with crime from one district to another. In such a case the magistrate normally is called upon to determine whether there is probable cause for the issuance of the warrant, and his determination is accordingly not subject to review. (3) A warrant of arrest may be sought to bring the accused into court after an indictment has been found against him. This is the situation involved in this case. The duty to issue a bench warrant in such a case has long been recognized without question in our law. That this duty is one which may not be denied in the guise of discretion is plainly indicated by several decisions of this Court.

II. The Fifth Amendment contemplates the issuance of a bench warrant after an indictment has been found. The Fourth Amendment forbids

the issuance of a warrant unless there is "probable cause." But the Fourth Amendment must be read together with the Fifth Amendment, and when an indictment has been found which is fair and valid on its face the Fifth Amendment contemplates that the person accused "shall be held to answer" for the crime charged.

III. The lack of a preliminary hearing is not a sufficient reason for refusing to issue a bench warrant. Although the respondent seems to rely on the fact that the indictment was found in this case without a preliminary hearing, his counsel concedes that such a hearing is not necessary. The correctness of this concession is established by many authorities. The lack of a preliminary hearing, therefore, affords no basis for the respondent's refusal to issue a bench warrant.

ARGUMENT

I

WHEN AN INDICTMENT HAS BEEN RETURNED, FAIR ON ITS FACE AND CHARGING AN OFFENSE WITHIN THE JURISDICTION OF THE COURT, THE ISSUANCE OF A BENCH WARRANT DOES NOT DEPEND UPON THE EXERCISE OF JUDICIAL DISCRETION

The respondent has admitted in his return that the grand jury in the Eastern District of Pennsylvania has returned an indictment against Joseph V. Wingert, and that that indictment charges Wingert with violations of the banking laws of the United States. No contention is made that the indictment is in any way irregular, or that

it does not adequately charge the offenses named. We submit that under such circumstances the issuance of a bench warrant does not involve the exercise of judicial discretion and that the refusal of the respondent to issue a bench warrant may be corrected by mandamus.

In considering the power and duty of a court to issue a warrant it is important to distinguish between three distinct situations. The failure of the respondent's counsel to make this distinction in his brief has, we believe, resulted in some confusion, and the citation of cases which are not pertinent in the present controversy.

1. A warrant of arrest may be sought from a magistrate prior to indictment upon the complaint of any person, either officer or citizen. In such a case it is plainly the magistrate's duty to determine whether the facts presented to him constitute probable cause for the issuance of a warrant. Such a determination involves the exercise of judicial discretion, and the magistrate is, of course, not subject to mandamus when he is acting in the legitimate exercise of this discretion. Many of the cases relied upon in the briefs of respondent's counsel[1]

[1] *State ex rel. Romano* v. *Yakey*, 43 Wash. 15; *People* v. *McGuire*, 151 App. Div. 413; *De Graff* v. *State*, 2 Okla. Crim. 519; *United States* v. *Ocampo*, 18 Philippine 1, 42; *Re Broom*, 18 Can. Cr. Cas. 254; *Rex* v. *Bros.*, 85 Law Times Rep. 581; *Rex* v. *Kennedy*, 86 Law Times Rep. 753.

Of these cases, *People* v. *McGuire*, *De Graff* v. *State*, and *Re Broom* in fact involved the question of the issuance of a warrant for the arrest of a person charged with an offense in an information. This question is, of course, closely related

relate to this situation and are obviously not pertinent here.

2. A warrant may be sought for the purpose of removing a person charged with crime from one district to another.[2] Here again the question before the magistrate is one of probable cause. Various issues may be presented to the magistrate, such as the identity of the accused and whether he has ever been within the district where the charge is made, as well as the adequacy of the facts disclosed to show that an offense has been committed. Where these questions are in issue before the magistrate, he must exercise his discretion, and his discretion is not subject to review. For this reason cases such as *Benson* v. *Henkel,* 198 U. S. 1, and *Price* v. *Henkel,* 216 U. S. 488, relied on by the respondent's counsel, are plainly distinguishable. A similar question was involved in *United States* v. *Judge Lawrence,* 3 Dallas 42. In that case the district

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to that raised when a warrant is sought on a mere complaint, since the information is the charge of the district attorney alone, or in some jurisdictions, of a private citizen. The cases cited in the footnote at the bottom of pages 7 and 8 of the brief of respondent's counsel involve the same question and are likewise not in point here.

[2] Strictly there are two steps in a removal proceeding, the warrant of arrest bringing the accused person before the magistrate, and the warrant of removal directing the transfer of the accused to the district where the offense was committed. We know of no case concerning the issuance of a warrant for arrest in a removal proceeding; in such cases the question has apparently arisen only on the warrant of removal.

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judge refused to order the removal of an accused person for trial in another jurisdiction on the ground that (p. 53) "the evidence was not sufficient to authorize his issuing a warrant * * *." The question before the district judge was thus plainly one involving the exercise of his judicial discretion, and this Court consequently refused to issue a writ of mandamus to compel the issuance of a warrant.

When there is no dispute as to the identity of the accused in a removal proceeding, and the charge against him is shown by a certified copy of an indictment, the situation becomes closely analogous to that involved here. In such a case, if the indictment be fair upon its face, this Court has held that the magistrate has no discretion but must order the removal of the defendant. *Fetters* v. *United States ex rel. Cunningham,* 283 U. S. 638.

3. A warrant of arrest may be sought to bring the accused into court after an indictment has been found against him. This is the situation involved in this case. None of the cases cited by the respondent's counsel relates to this question, and we know of none which directly decide it. See *In re Davis,* 107 N. J. Eq. 160, 175, 178; *State* v. *Gordon,* 18 La. Ann. 528; *Shaw* v. *Commonwealth,* 1 Duval 1 (Ky.). The lack of authority on this question, we believe, is due to the fact that warrants have always been issued in such a case as a matter of course, and no district judge has ever before de-

clined to issue a bench warrant upon the filing of an indictment, or made further inquiry before issuing it.

The duty to issue a bench warrant in such a case has long been recognized without question in our law. Thus, in 1 Chitty, *Criminal Law,* 339–340, the author states that—

> it appears to be *the established practice,* upon an indictment found for a misdemeanor during the assizes or sessions, to issue a bench warrant signed by a judge or justices of the peace, or two of the latter, to apprehend the defendant; and when the assizes and sessions are over, the clerk of the assize and clerk of the peace respectively will, on the application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the King's Bench or justice of the peace of the proper county *will grant* a warrant for apprehending the defendant, * * *. (Italics ours.)

Similarly, in 1 Archbold, *Criminal Procedure,* 103, the practice is stated as follows:

> Upon an indictment being found at the assizes or quarter sessions, if the defendant be not in custody, or if out on bail, and it be doubtful whether he will surrender to take his trial, the court upon application, *will grant a bench warrant,* upon which he may be apprehended as upon any other warrant, as mentioned; * * *. (Italics ours.)

See also 2 Hale, *Pleas of the Crown,* 198–199.

There is nothing to indicate that this rule and practice has been changed in any way in more modern times. The same rule is stated in Section 195 of the American Law Institute's Code of Criminal Procedure (Official Draft, 1930), which provides as follows:

> SECTION 195. *Warrant to be issued on indictment or information.*—When an indictment has been found or an information filed against a person charging him with the commission of an offense, if he is not in custody or at large on bail for the offense charged, the court or a judge thereof *shall,* subject to the provisions of section 196 [section 196 relates to the issuance of a summons in the case of a misdemeanor], direct the clerk to issue either immediately or when so directed by the prosecuting attorney a warrant of arrest to secure the presence of such person to answer the indictment or information. The warrant may be reissued from time to time by order either of the court, judge or prosecuting attorney. (Italics ours.)

The commentaries to this provision in the Code of Criminal Procedure cite and quote the State statutory provisions now in effect on this question. In many of the States the issuance of a bench warrant after the finding of an indictment is regarded as so far ministerial that it is issued by the clerk without any order by the court and in some instances by the district attorney. See, *e. g.,* N. Y. Code of Criminal Procedure, Sec. 300. ("A bench warrant * * * may also be issued by the district attorney at any

time after the indictment is found.") In nearly all of the States where such statutes are in force constitutional provisions similar to the Fourth Amendment are also in effect.[3] This is a persuasive practical construction of the constitutional provision which has never been questioned.

That the duty of the district court to issue a bench warrant is one which may not be denied in the guise of discretion, is plainly indicated by several decisions of this Court. Thus, in *United States* v. *Thompson*, 251 U. S. 407, 412–413, this Court held that the "absolute right of the United States to prosecute" can not be thwarted "by the application of unauthorized judicial discretion."[4] In *Ex parte United States*, 242 U. S. 27, 42, this Court held that the judicial power did not embrace "a discretionary authority to permanently refuse to try a criminal charge." These words describe the present situation exactly. Unless the accused comes into court voluntarily (which is not at all

[3] References to the constitutions and statutes of these States are given in the Appendix, *infra*, pp. 17–18.

[4] Similarly, it is held in numerous State decisions that the court may not on its own motion order the dismissal of an indictment. *People* v. *Zobel*, 54 Colo. 284; *State* v. *Morrison*, 165 Ind. 461; *Commonwealth* v. *Cundiff*, 149 Ky. 37; *Commonwealth* v. *Hughes*, 153 Ky. 34; *Slater* v. *Commonwealth*, 239 Ky. 620, 624; *Commonwealth* v. *Andrews*, 2 Mass. 409, 414; *Commonwealth* v. *Hart*, 149 Mass. 7; *State* v. *Mathews*, 98 Mo. 125, 129; *State* v. *Hickling*, 45 N. J. L. 152; *People* v. *Bennett*, 49 N. Y. 137, 141; *People* v. *Harris*, 1 Edmonds Select Cases (N. Y.) 453, 464; *People* v. *Beckwith*, 2 N. Y. Crim. Rep. 29; *Commonwealth* v. *Reed*, 65 Pa. Super. Ct. 91, 94; *State* v. *McLane*, 31 Texas 260; *State* v. *Anderson*, 119 Texas 110.

probable), the court's refusal to issue a bench warrant amounts to a permanent refusal to try the criminal charge. In the language of this Court in *United States* v. *Thompson*, 251 U. S. 407, 415—

> the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

The act of issuing a bench warrant to apprehend a defendant named in an indictment is purely ministerial. The warrant is the original process by which the defendant is brought before the court for arraignment upon the indictment, upon which no proceedings may be had until the defendant is arraigned. The act of issuing process determines nothing, and is no more judicial than the issuance of a summons in a civil suit or a subpœna for the attendance of a witness. Given an indictment fair upon its face, and duly returned by the grand jury, the issuance of the warrant is but a ministerial step in the process by which the validity of the indictment and the guilt or innocence of the defendant may be judicially determined. The refusal of process was in effect a refusal to proceed at all.

II

THE FIFTH AMENDMENT CONTEMPLATES THE ISSUANCE OF A BENCH WARRANT AFTER AN INDICTMENT HAS BEEN FOUND

Counsel for the respondent quotes the Fourth Amendment (*supra*, p. 2) in his brief (p. 6) and apparently relies upon that part of the Amendment which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." He argues from this that the issuance of a warrant in any case requires the determination of "probable cause" and that this determination necessarily involves an exercise of judicial discretion. In the Supplemental Brief for the respondent this ground is apparently relied on as the sole basis for the decision below.

But the Fourth Amendment and the Fifth Amendment are *in pari materia* (*Boyd* v. *United States*, 116 U. S. 616, 633), and must be read and construed together. The Fifth Amendment's provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *" plainly contemplates that when "a presentment or indictment of a Grand Jury" has been returned, the accused "shall be held to answer." When the two amendments are thus read together it becomes apparent that the Fourth Amendment relates to warrants sought before a committing magistrate when no indictment has been returned. In such a case the Fourth Amendment forbids the

issuance of a warrant unless there is "probable cause." But where an indictment has been found which is fair and valid on its face, the Fifth Amendment contemplates that the person accused "shall be held to answer" for the crime charged.

From this it follows that the question presented to the respondent in this case did not involve any determination of probable cause. When the indictment was returned by the grand jury it was the respondent's duty to issue a bench warrant. This duty involved the exercise of no discretion, and the failure to issue the warrant may be corrected by mandamus.

III

THE LACK OF A PRELIMINARY HEARING IS NOT A SUFFICIENT REASON FOR REFUSING TO ISSUE A BENCH WARRANT

It is difficult to tell from the opinion of the respondent upon just what grounds his decision was based. Apparently he refused to issue a bench warrant because the indictment involved in the present case had been returned by the grand jury without a preliminary hearing of the accused before a committing magistrate. Thus, in his opinion, the respondent stated (Pet. p. 21) that—

> The instant case has been chosen merely because it was a case in which no preliminary inquiry has been made, but in which there was no special reason one should not be made.

And in the brief of the respondent's counsel (p. 11) it is stated that—

> the situation would not have arisen had the accused been brought before a United States Commissioner in the first instance.

But if this was the basis of the respondent's decision, he has already admitted its inadequacy. In the very brief in which the statement just quoted above is printed, the following statement is made (p. 7):

> The United States says that no preliminary hearing is necessary (brief, p. 6). This is unquestionable law.

In this final statement counsel for the respondent is undoubtedly correct; but we have been unable to reconcile the inconsistency between this statement and the one previously quoted from the same brief.

That a preliminary examination prior to the return of an indictment is not required or necessary is established by many authorities.[5] The Consti-

[5] The cases so holding are unanimous and include at least two cases in the Eastern District of Pennsylvania. *United States* v. *Reilly*, 30 F. (2d) 866 (E. D. Pa.); *United States* v. *Averett*, 26 F. (2d) 676 (W. D. Va.); *Van Dam* v. *United States*, 23 F. (2d) 235 (C. C. A. 6th); *Roth* v. *United States*, 294 Fed. 475 (C. C. A. 6th); *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.); *United States* v. *Fuers*, Fed. Cas. No. 15174 (W. D. Pa.). See *Goldsby* v. *United States*, 160 U. S. 70, 73; *United States* v. *Kilpatrick*, 16 Fed. 765, 770–771 (W. D. N. C.). Compare *United States* v. *Jenks*, 258 Fed. 763 (E. D. Pa.).

tution does not require any preliminary hearing. Fifth Amendment (*supra*, p. 2); see *Hughes* v. *Gault*, 271 U. S. 142, 149. The finding of an indictment without a sworn charge previously made is legal, and "it is settled that such a charge is unnecessary." *Ruthenberg* v. *United States*, 245 U. S. 480, 482–483; *Hale* v. *Henkel*, 201 U. S. 43, 59–60. The practice of requiring a preliminary examination of a criminal complaint was the English practice, and it has been adopted in some of the States of the Union, for example, Pennsylvania and North Carolina. See *Hale* v. *Henkel*, *supra*, at pp. 64–65. But the English practice is not followed by nor binding upon the United States courts. *United States* v. *Thompson*, 251 U. S. 407; *Hale* v. *Henkel*, *supra*; *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.).

CONCLUSION

The writ of mandamus should issue as prayed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

The constitutions of the following States contain provisions forbidding the issuance of warrants except upon "probable cause" in language the same as, or substantially similar to, the Fourth Amendment. In these States there are also statutes in effect which direct the court or the clerk to issue a warrant upon the return of an indictment without further inquiry.

Alabama. *Constitution:* Art. I, Sec. 5. *Statute:* Code, 1928, Sec. 3278 ("A writ of arrest must be issued by the clerk").

Arkansas. *Constitution:* Art. II, Sec. 15. *Statute:* Digest of Statutes, 1921, Sec. 3041 ("the court shall forthwith make an order").

Colorado. *Constitution:* Art. II, Sec. 7. *Statute:* Comp. Laws, 1921, Sec. 7082 ("It shall be the duty of the clerks" to issue process on indictments).

Florida. *Constitution:* Declaration of Rights, Sec. 22. *Statute:* General Laws, 1927, Sec. 8375 ("a capias shall issue").

Illinois. *Constitution:* Art. II, Sec. 6. *Statute:* Rev. Stat., 1929, c. 38, Sec. 747 (the clerk "shall immediately issue process").

Indiana. *Constitution:* Art. 1, Sec. 11. *Statute:* Burns Stat., 1926, Sec. 2153 ("the clerk shall issue a warrant").

Iowa. *Constitution:* Art. I, Sec. 7. *Statute:* Code, 1927, Sec. 13760 ("the judge of the court shall make an order").

Kansas. *Constitution:* Bill of Rights, Sec. 15. *Statute:* Rev. Stat., 1923, Sec. 62–1101 ("the clerk must issue a warrant").

Kentucky. *Constitution:* Bill of Rights, Sec. 10. *Statute:* Car. Codes, 1927, Crim. Prac., Sec. 141 ("the court shall forthwith make an order").

Louisiana. *Constitution:* Art. I, Sec. 7. *Statute:* Code of Criminal Procedure, 1929, Art. 55 ("the presiding judge shall cause a warrant to issue").

Mississippi. *Constitution:* Art. 3, Sec. 23. *Statute:* Code, 1930, Sec. 1218 (process "shall be issued").

Missouri. *Constitution:* Art. II, Sec. 11. *Statute:* Rev. Stat. 1919, Sec. 3910 (the clerk "must issue warrants upon all indictments").

Montana. *Constitution:* Art. III, Sec. 7. *Statute:* Rev. Codes, 1921, Sec. 11839 ("a warrant must issue").

Oregon. *Constitution:* Art. I, Sec. 9. *Statute:* Code, 1930, Sec. 13–813 ("the court must order the clerk to issue a bench warrant").

Tennessee. *Constitution:* Art. I, Sec. 7 (*semble*). *Statute:* Code, 1932, Sec. 11609 (capias "shall be issued by the clerk").

Texas. *Constitution:* Art. I, Sec. 9. *Statute:* Rev. Stat. 1925, Crim. Proc., Art. 443 ("A capias shall be immediately issued by the district clerk upon each indictment").

Virginia. *Constitution:* Art. I, Sec. 10 (*semble*). *Statute:* Code, 1930, Sec. 4881 (the court "shall award process").

West Virginia. *Constitution:* Art. III, Sec. 6. *Statute:* Code, 1932, Sec. 6177 ("the court shall award process").

Wisconsin. *Constitution:* Art. I, Sec. 11. *Statute:* Wis. Stat. 1931, Sec. 355.02 ("process shall forthwith be issued").

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

ON RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES DISTRICT COURT.

FRANCIS BIDDLE,
1601 *Morris Building, Philadelphia.*

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BRIEF FOR THE UNITED STATES DISTRICT COURT.

ARGUMENT.

I.

When a Mandamus May Issue.

(*a*) *To enforce the performance of a ministerial but not of a discretionary act.*

It is an accepted principle of our law that mandamus may be used to compel the judge of an inferior court,

or executive officer, to act when he has refused to act;[1] or to perform a purely ministerial act.[2] But it will not issue where any discretion or judgment is to be exercised. Thus in *Ex parte Myra Clarke Whitney,* 13 Pet. 404 (1839), Justice Story said, p. 408: "A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the other party".[3]

---

[1] An example of this is where a district court refused to act on a motion to quash an indictment and on a motion for speedy trial, the mandamus issued by the Circuit Court of Appeals in aid of its appellate jurisdiction. *Frankel* v. *Woodrough,* 7 F. (2nd) 796 (1925).

[2] Failing to seal a bill of exceptions; but not to force the trial judge to include the entire charge in the record. *Ex parte Crane,* 5 Pet. 190 (1831); or to complete a record by signing a judgment. *Life and Fire Insurance Company of New York* v. *Wilson's Heirs,* 8 Pet. 291, 304 (1834): "On a mandamus a Superior Court will never direct in what manner the discretion of an inferior tribunal shall be exercised"; but not to enter a judgment where any discretion is involved. *The Life and Fire Insurance Company of New York* v. *Christopher Adams,* 9 Pet. 573 (1835).

[3] A line of cases held that mandamus will lie to compel a circuit court to remand a case, where it has no jurisdiction, on the theory that the "discretion" must be exercised within the "limits of jurisdiction." *In re Winn,* 213 U. S. 458 (1908), citing previous cases to the same effect. But these decisions are overruled in *Ex parte Roe,* 234 U. S. 70 (1913), where Mr. Justice

A long line of cases establishes this view. Brief quotations are sufficient:

> "The only acts to which the power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer."
>
> *The United States* v. *Guthrie*, 17 How. 284, 304 (1854).

> "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to enter judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render * * *."
>
> *Ex parte Newman*, 14 Wall. 152, 165 (1871).

And mandamus will not always lie even to compel the performance of a ministerial act. Mr. Justice Lamar said:[1]

Van Devanter said, p. 73: "The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision."

[1] *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636, 644 (1891). Such a case would seem to be *Ex parte William Many*, 14 How. 24 (1852), where the

> "It is proper here to remark, as applicable to the determination of this case, that, in the *extreme caution with which this remedy is applied* (italics ours) by the courts, there are cases where the writ will not be issued to compel the performance of even a purely ministerial act."

(*b*) *Mandamus should not be used for an appeal or writ of error.*

This Court has continually emphasized such a view. If mandamus will not issue where judgment is involved it follows that it will not lie to correct erroneous judgment. Judge Dickinson may be mistaken in refusing a bench warrant. Such error yields no ground for mandamus. Judge Story says in another case: "Now a writ of mandamus is not a proper process to correct an erroneous judgment or decree rendered by an inferior court."[1]

(*c*) *Mandamus will not issue to review an interlocutory order.*

Judge Dickinson's order was interlocutory; and not therefore appealable. This the United States admits (brief, p. 9). "Least of all can a writ of mandamus be granted to review a ruling or interlocutory order made

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court left a blank space in the record where costs should have been taxed. A mandamus to compel the court to fill in the blank was refused, the court having refused a motion to so amend the record, and having thus exercised its discretion.

[1] *Ex parte Hoyt*, 13 Pet. 279 (1839).

in the progress of a cause." *American Construction Co.* v. *Jacksonville etc. Railway Co.,* 148 U. S. 372 (1892). And, the case holds, it does not follow, as the United States argues (brief, p. 4), that because the United States cannot appeal, mandamus is a remedy (p. 379).[1]

(*d*) *Mandamus is an extraordinary remedy.*

"Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be. * * * It may not be resorted to * * * for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings * * * even though the order cannot be reversed on error or appeal." *Ex parte Wagner,* 249 U. S. 465 (1918).

"The obligation must be peremptory and plainly defined. The law must not only authorize the act, it must require it to be done."[2]

---

[1] It is interesting to note, in this connection, that this Court said, in *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522 (1866), 534: "It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal."

[2] *McCarty* v. *United States,* 19 F. (2nd) 462 (1927), Circuit Court of Appeals for the Eighth Circuit.

II.

A Bench Warrant Issues on Probable Cause.

The Fourth Amendment of the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Solicitor General suggests that the return of an indictment is "at least *prima facie* evidence of probable cause" (brief, p. 6). But the determination of probable cause involves an act of judicial discretion, particularly if the indictment is but *prima facie* evidence. The expression implies that in face of better evidence the presumption may be overcome, and probable cause found lacking—a judicial determination.

The point is illustrated in extradition proceedings. There the indictment furnishes ground for probable cause, raising a presumption which may be overcome. *Benson* v. *Henkel*, 198 U. S. 1 (1904). In that case Mr. Justice White said, p. 16:

> "*But the order of removal involves judicial rather than mere ministerial action* (italics ours) and must be issued by the judge of the District when the case made warrants it * * * and whether found in the indictment, or as the

> result of other testimony, the order to remove the accused can only be issued upon a showing of probable cause."[1]

And in *Price* v. *Henkel*, 216 U. S. 488 (1909), the Court said that the introduction of the indictment on a petition for an order of removal was "at least a *prima facie* case for the removal," but was not conclusive. Removal requires judicial inquiry.[2]

III.

This Court Has Specifically Ruled the Question.

The Supreme Court decided, as early as 1795, that the issuing of a warrant of arrest is a *judicial* act.

---

[1] The United States says that no preliminary hearing is necessary (brief, p. 6). This is unquestionable law. But the accused has the right to contest jurisdiction in a removal proceeding. *Hughes v. Gault*, 271 U. S. 142 (1926), Mr. Justice Brandeis dissenting, on the ground that the accused was denied his constitutional rights under the Fifth Amendment when the Commissioner refused to consider his evidence bearing on probable cause.

[2] This and the other cases cited by the United States (brief, p. 6) all deal with petitions for removal. I can find no cases specifically holding that an indictment furnishes probable cause for the issuance of a warrant of arrest, although such seems to be the practice. Informations, unsupported by affidavit, do not furnish the necessary grounds. *United States* v. *Turcaud*, 20 F. 621 (1884); *Johnston* v. *United States*, 87 F. 187 (1898); *United States* v. *Baumert*, 179 F. 735

The United States v. *Judge Lawrence,* 3 Dal. 42.[1] A motion was made by the Attorney General of the United States for a rule to show cause why a mandamus should not be directed to Judge Lawrence, of the District of New York, to compel him to issue a warrant for apprehending Captain Barre, a commander of the frigate *Le Perdrix,* belonging to the French Republic. The application for the warrant was made by the French Consul, under authority of a consular convention between France and the United States. The judge refused to issue the warrant on the ground that the convention required production of the ship's registry to prove that Barre was one of the crew; and would not accept a copy of the "Role d'equipage," certified by a Vice-Consul, claimed to be sufficient under the convention. The court said:

(1910); *Weeks* v. *United States,* 216 F. 292 (1914—2nd C. C. A.); and *United States* v. *Michalski,* 265 Fed. 839 (1919) where a warrant of arrest was refused though the information was supported by an affidavit made on information and belief. The latter case quotes at length from an opinion to the same effect by Mr. Justice Bradley, sitting in circuit, in *Re Rule of Court,* 3 Woods 502, Fed. Cas. No. 12,126, holding that the committing magistrate must be given an opportunity to "judge for himself" whether probable cause exists —obviously an act of discretion. The indictment, after all, is nothing else than a statement that someone has found probable cause. Finding probable cause for the issuance of a search warrant is a judicial function. *U. S.* v. *Harnich,* 289 F. 256 (1922).

[1] Also reported in 3 Dal. 42 (Pa.), where the arguments are reported at length.

> "We are clearly and unanimously of the opinion that a mandamus ought not to issue. It is evident, that the District Judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment but his own."

The government's brief overlooks the case, and cites, in a footnote (p. 7) two State cases alleged to sustain its position. But in the Louisiana case there was an order of the court, authorizing the arrest, so that the *clerk's* act, in issuing the warrant, was ministerial.

The State authorities are in conflict. In *State of Washington ex Rel. Romano* v. *Yakey,* 43 Wash. 15 (1906), the State Supreme Court refused to mandamus a committing magistrate to hear a case which he had dismissed because he thought that the district attorney should have first investigated it. The court said, p. 21:

> "Whether a warrant should issue or not is a question this court will not determine, nor can we control the judgment or discretion of the officer to whom the application was made."

Mandamus will not lie to compel a magistrate to issue a warrant of arrest. *People* v. *McGuire,* 151 Ap. Div. (N. Y.) 413 (1912), p. 415: "Such error may not be corrected by mandamus, and the magis-

trate compelled to issue either a warrant or a summons." The issuance of a warrant of arrest is a judicial act, *DeGraff* v. *State*, 2 Okl. Cr. 519 (1909); the magistrate's conclusion as to what constitutes probable cause is conclusive, *United States* v. *Ocampo*, 18 Philippine 1, 42; and is not subject to review. *In Re Broom*, 18 Can. Cr. Cas. 254.

Several States, however, take the opposite view. *Benners* v. *The State*, 124 Ala. 97 (1899); *Attorney General ex rel.* v. *Police Justice of Detroit*, 40 Mich. 631 (1879); *Nebraska ex rel.* v. *McCutcheon*, 20 Neb. 304 (1886); *State ex rel.* v. *Laughlin*, 75 Mo. 358 (1882). In the last case cited Mandamus issued to compel the lower court to assume jurisdiction of a case; and some of the cases can be explained on the theory that the appellate court believed that the magistrate had refused to act; not that he had considered the question and had then declined to issue a warrant. This distinction is made in the English cases. *Reg.* v. *Adamson*, 1 Q. B. Div. 201 (1876), where the mandamus was allowed because the court thought that the justices had not exercised discretion, but had acted from considerations "apart from the facts"; but in *Rex* v. *Bros.*, 85 Law Times 581 (1901), Lord Alverstone refused a mandamus to compel a magistrate to issue a summons, since an act of discretion was involved.

If Judge Dickinson had no discretion he would not even be permitted to examine the indictment to see if a crime were properly alleged.

The judge may have been grossly mistaken in his decision. But he did not refuse to act. This action involved a judicial determination. The judgment was interlocutory. Mandamus should not be used to correct it. That the United States has possibly no other remedy is unfortunate. But the situation would not have arisen had the accused been brought before a United States Commissioner in the first instance.[1]

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[1] The question of where the writ should issue, if at all, is not here raised, as a decision of the judge's power is desired. But because no appeal could be taken to the Circuit Court of Appeals from this interlocutory order, does not mean that the case is not within the "appellate jurisdiction" of that court. And it may be doubted whether this court has power to issue the writ where its jurisdiction is neither original nor appellate. *In Re Massachusetts*, 197 U. S. 482 (1905); *In re Glaser*, 198 U. S. 171 (1905). For a recent discussion see *In re Babcock*, 26 F. (2d) 153 (1928).

Respectfully submitted,

FRANCIS BIDDLE,
for the Hon. Oliver B. Dickinson and the United States District Court for the Eastern District of Pennsylvania.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 19, Original

EX PARTE: THE UNITED STATES, PETITIONER.

ON RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES DISTRICT COURT.

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(Under Order of Court Permitting Filing of Further Briefs, Entered October 10, 1932.)

ARGUMENT.

Judge Dickinson's Opinion.

The grounds of the District Court's refusal to issue a bench warrant must be clearly understood to determine the nature of the judicial discretion so exercised.

The order denies the motion for a bench warrant on the opinion filed (Record, 7). The opinion, however, in denying the prayer of the petition, expressly gives "leave to the United States Attorney to submit proof of facts so that the Bench Warrant, if issued, will have the support required by the Fourth Amendment (Record, 25)." The court admits the right of the United States to indict in the first instance under the authority of the *Thompson* case (1). In that case the court held that a grand jury could indict, where another grand jury had ignored, without leave of court. The case arose in Pennsylvania, where the State decisions had laid down a contrary rule (2); but were held not controlling as being in conflict with the rule in United States courts. But in the *Thompson* case the grand jury was acting, and, it was held, could act, without the aid of the court. Here to bring the defendant into court the District Attorney must obtain the court's leave.

Judge Dickinson does not decide that, where an indictment first issues, he will not grant a bench warrant. He decides that in this particular case he will not grant the warrant on the naked petition and indict-

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(1) 251 U. S. 407 (1920). In *Albrecht* v. *United States,* 273 U. S. 1 (1926), Mr. Justice Brandeis held that leave to file an information must first be obtained, in spite of certain language in the *Thompson* case, thus upholding the discretion of the trial judge in controlling this practice. The Justice points out that this was the practice in most jurisdictions (note. p. 5).

(2) Collected in note, p. 415.

ment, unsustained by supporting evidence. He holds that where a man has been indicted without preliminary hearing the court has discretion, and on occasion will exercise it, to refuse a warrant for his arrest, to examine into the facts (as in *habeas corpus*, removal, and petition for bench warrant on an information) "so that the Bench Warrant, if issued, will have the support required by the Fourth Amendment (1)."

The Solicitor General argues that the process of law has been arbitrarily blocked. But the District Attorney could have proceeded by bowing to the court's exercise of discretion, and by introducing evidence to establish, in that manner, a *prima facie* case. If, when such evidence had been introduced, the petition had been refused the action might have been arbitrary; though not even then would their have been ground for mandamus.

And that the law permits filing an indictment as a preliminary step does not sanctify such practice. "If an indictment is secretly found and a bench warrant follows a defendant may be hauled into court by 'railroad' * * * All the protection before given accused person, is thus cut out except that given by the Grand Jury * * * We can readily understand that this is a great convenience to the United States Attorney and the Inspector officers. It is, however, at the cost of ignoring the United States Commissioners and of denying the accused the right, through a denial of the opportunity, to get the judg-

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(1) Record p. 25.

ment of the Court upon the question of probable cause (1)."

The court suggests—as a test of the question—that it should not be forced "without inquiry to deprive anyone of his liberty when upon such inquiry the judgment of the court would be that such deprivation would be unwarranted (2)". And the court adds that the question of the *existence* of the power must not be confused with the *propriety of its exercise.* Until evidence is submitted to support the petition the latter question does not arise.

The discretion here exercised is recognized in the English cases. Lord Alverstone refused a rule for a mandamus to compel a magistrate to issue a summons for an offense against the Roman Catholic Relief Act because the magistrate had taken jurisdiction, but had exercised a discretion "that he will or will not allow the process of the court (3)", saying, p. 756:

"The justices may, however, it would seem, in the exercise of their discretion refuse to issue a summons even though there is evidence before them of an alleged indictable misdemeanor, if they consider that the issue of the summons would be vexatious or improper. * * * It is impossible to say that there

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(1) Record, p. 15, 18, 19.

(2) Record, p. 20.

(3) *Rex.* v. *Kennedy,* 86 L. T. 753 (1902).

is no discretion simply because there is *prima facie* evidence that an indictable offense has been committed (757) (1)."

A similar decision was made by this Court in *Ex parte Burtis* (2). The Court refused a mandamus to compel a witness to obey a subpœna *duces tecum*. "The District judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we cannot, by *mandamus*, compel him to undo what he has thus done in the exercise of his legitimate jurisdiction."

The District Court suggests that its order refusing the petition is as much a final order, and thus subject to review, as the quashing of the indictment in the *Thompson* case (3). But there the case was at an end. Here the indictment is still pending; and the United States is at liberty to renew its application for a bench warrant, supported by evidence.

The question of this Court's jurisdiction to issue a writ was touched on in our first brief (Note 1, p. 11).

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(1) See also, to the same effect, *Ex parte Lewis*, 21 Q. B. Div. 191 (1888), both cases distinguishing the *Adamson* case (Brief for U. S. District Court, p. 10).

(2) 103 U. S. 238 (1880).

(3) Record, p. 24.

The true test is the existence of the jurisdiction, and not its prior invocation (1).

Respectfully submitted,

FRANCIS BIDDLE,
For the Hon. Oliver B. Dickinson and the United States District Court for the Eastern District of Pennsylvania.

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(1) *Barber Asphalt Co.* v. *Morris*, 132 F. 945, 955 (1904); *M'Cluny* v. *Silliman*, 6 Wheat. 598 (1821); *Bath County* v. *Amy*, 13 Wall. 244 (1871); *McClellan* v. *Carland*, 217 U. S. 268 (1910); *Del. Lack. & W. Ry. Co.* v. *Relstab*, 276 U. S. 1 (1927); *Re Babcock*, 26 F. (2d) 153 (1928). For cases which held that the appellate jurisdiction had to be actually invoked see *Muir* v. *Chatfield*, 255 F. 24 (1918); *United States* v. *Judges of United States Court of Appeals*, 85 F. 177 (1898). If the judgment is appealable mandamus will not lie; nor even where there is no appeal unless it appears that the court below had refused to act. *Ex parte Newman*, 14 Wall. 152 (1871).

SUPREME COURT OF THE UNITED STATES.

No. 19, Original.—October Term, 1932.

Ex parte United States. } On Petition for a Writ of Mandamus.

[December 5, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an application for a writ of mandamus requiring the federal district judge sitting in the United States District Court for the Eastern District of Pennsylvania and the court itself to set aside an order denying a petition of the United States attorney for the issue of a bench warrant for the arrest of Joseph V. Wingert, and directing that such bench warrant be issued. The case is here for decision upon the return of the court and judge to a rule to show cause why the application for the writ should not be granted. The facts follow.

On March 10, 1932, a grand jury for the district, duly empaneled, returned an indictment against Wingert, charging him with violating certain provisions of the banking laws of the United States. No question is raised as to the regularity of the proceedings before the grand jury, or as to the sufficiency of the indictment. On March 22, the United States attorney presented to the court a written petition praying that a bench warrant issue for Wingert's arrest. The district court, with nothing before it, so far as the record discloses, but the petition and the indictment, denied the petition and refused to issue the warrant. The sole ground alleged in the return for such denial is that the matter was within the judicial discretion of the court, and, therefore, not subject to mandamus proceedings.

1. It first is necessary to determine whether under these facts we have jurisdiction to issue the writ. Section 716, Rev. Stats. (§ 262 of the Judicial Code, U. S. C., Title 28, § 377), provides that this court and other federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and

agreeable to the usages and principles of law." As early as 1831 it was settled that this court had power to issue a mandamus directed to a federal circuit court commanding that court to sign a bill of exceptions, such action being in the nature of appellate jurisdiction. *Ex parte Crane,* 5 Pet. 190, 193. In *Marbury* v. *Madison,* 1 Cranch 137, 175, it was held that to warrant the issue of a mandamus by this court, in cases where original jurisdiction had not been conferred by the Constitution (see *Commonwealth of Ky.* v. *Dennison, Governor, &c.,* 24 How. 66, 97), it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction. *McClellan* v. *Carland,* 217 U. S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R. S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." See also *D., L. & W. R. R.* v. *Rellstab,* 276 U. S. 1, 5; *In re Babcock,* 26 F. (2d) 153, 155; *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945, 952-956.

Perhaps it would be enough to satisfy the test afforded by these decisions to point to the limited authority of this court under c. 2564, 34 Stat. 1246, U. S. C., Title 18, § 682 (U. S. C. Title 28, § 345) to exercise direct appellate jurisdiction to review a decision of the district court in the possible event that some action of that court might give rise to a right of review at the instance of the government. We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged.

It is true this court has held that it was without authority to issue a writ of mandamus to the Supreme Court of the District of Columbia, because, since the creation of the Court of Appeals of the District of Columbia, this court could not review the judgments and decrees of the supreme court of the district directly by appeal or writ of error. *In re Massachusetts,* 197 U. S. 482. And

see also *In re Glaser,* 198 U. S. 171. Assuming that an application of those decisions to the present case would necessitate a denial of the writ, later cases clearly indicate that the rule as thus limited no longer obtains. In *McClellan* v. *Garland, supra,* p. 279, this court significantly suggested that it should be slow to reach a conclusion which would have the result of depriving the court of the power to issue the writ in proper cases to review the action of the federal courts inferior in jurisdiction to itself. And in *Ex parte Abdu,* 247 U. S. 27, 28, Mr. Chief Justice White, speaking for the court, said:

"The existence of ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents."

This statement, it is true, related to the refusal of a circuit court of appeals to direct its clerk to file the record in an appeal from a district court; but it was followed broadly in *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701. In that case an application for mandamus was made to this court to compel a district court to hear a patent case, instead of referring it to a master, in alleged violation of Equity Rules 46 and 59. This court, after pointing out that the hearing of the cause in review would normally be had in the circuit court of appeals and could come here only in due course by certiorari, and saying that it was unnecessary to decide whether the writ would issue direct to the district court in matters as to which the circuit court of appeals would or should ordinarily have power to issue a mandamus to the same end in aid of its appellate jurisdiction, continued (p. 706):

"However that may be, we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty of this Court to formulate and put in force, and in a case in which this Court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them. *Ex parte Abdu,* 247 U. S. 27, 28; *Ex parte Crane,* 5 Peters 190, 192, 193, 194. This is not to say that in every case where the Equity Rules are the subject of interpretation and enforcement in the District Court, such questions may as of course be brought here and considered in a direct proceeding in mandamus. The question of thus using the writ of mandamus would be a matter of discretion in this Court, and it would decline to exercise its

power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review. If it clearly appeared, however, that a practice had been adopted by district judges, as to the order or procedure in hearing causes, at variance with the equity rules, our writ might well issue directly to such judges."

In other, and readily distinguishable, cases where the direct appellate jurisdiction was vested in the circuit court of appeals, this court, in the exercise of its discretion, has declined to issue the writ and relegated the applicant to his remedy in that court. *Ex parte Apex Electric Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533.

The rule deducible from the later decisions, and which we now affirm, is, that this court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases. That the present case falls within the latter description seems clear. The effect of the refusal of the district court to issue a warrant upon an indictment fair upon its face and properly found and returned is equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial, since that cannot be done in his absence. The mere statement discloses the gravity and public importance of the question. It is obvious that if a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result. Undoubtedly, upon the theory presented by the government, mandamus is the appropriate remedy; and the writ may well issue from this court in order to expedite the settlement of the important question involved, and, incidentally, in furtherance of the general policy of a prompt trial and disposition of criminal cases. Accordingly, we pass to a consideration of the merits.

2. The theory of the court below is that its denial of the petition of the government for a bench warrant was an exercise of its judicial discretion, and, therefore, not reviewable by mandamus. This view of the matter cannot be sustained. The question whether there was probable cause for putting the accused on trial was for the grand jury to determine, and the indictment being fair on its face, the court to which it was returned, upon the application of the United States attorney, should have issued the warrant as a matter of course. Cases are cited said to be to the contrary, but they are not in point. They are either cases where the warrant was sought from a magistrate upon complaint in the absence of an indictment, or was sought under the removal statute, R. S. § 1014, U. S. C., Title 18, § 591. Obviously, the first named cases are without application. In cases arising under the removal statute the indictment is produced and considered not as a basic pleading, but merely as evidence establishing or tending to establish the commission of the offense and which may or may not settle the question of probable cause. In the trial court to which the indictment has been returned it is "the very foundation of the charge." *Benson* v. *Henkel,* 198 U. S. 1, 12; *Morse* v. *United States,* 267 U. S. 80, 83; *Fetters* v. *United States,* 283 U. S. 638, 642.

It reasonably cannot be doubted that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer. Compare *McGrain* v. *Daugherty,* 273 U. S. 135, 156-158; *Hale* v. *Henkel,* 201 U. S. 43, 60-62. The refusal of the trial court to issue a warrant of arrest under such circumstances is, in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law. The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it the power to decline to do so under the guise of judicial discretion; or, as this court suggested in *Ex parte United States,* 242 U. S. 27, 42, the power to enforce does not inherently beget a discretion permanently to refuse to enforce. In *United States* v. *Thompson,* 251 U. S. 407, an order of a federal district court quashing an indictment on the ground that the charge, having been submitted to a previous grand jury, had been resub-

mitted to a later one without leave of court first obtained, was set aside. This court there said that the power and duty of the grand jury to investigate is original and complete, and may be exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not exhausted or limited by adverse action taken by a previous grand jury, and that a United States district attorney may present, without leave of court, charges which a previous grand jury has ignored. The necessary effect of the district court's order, it was said (pp. 412-413), "was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power," and to bar the lawful authority of the United States attorney and of the grand jury "by the application of unauthorized judicial discretion." These observations are pertinent here.

Rule made absolute.

A true copy.

Test:

Clerk, Supreme Court, U. S.